FILE COPY

Nos. 577-581, 585-587.

Supreme Court of the United States

OCTOBER TERM, 1935.

RICKERT RICE MILLS, INC., PETITIONER,
v.
RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA, RESPONDENT.

A. B. DORE, PETITIONER,
v.
RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA, RESPONDENT.

UNITED RICE MILLING PRODUCTS CO., INC., PETITIONER,
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NOBLE-TROTTER RICE MILLING CO., INC., PETITIONER,
v.
RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND MOTION FOR INJUNCTION TO PRESERVE STATUS QUO.

REPLY BRIEF FOR PETITIONERS.

HOMER L. BRUCE,
JOHN P. BULLINGTON,
Counsel for Petitioners.

BAKER, BOTTS, ANDREWS & WHARTON,
Of Counsel.

Houston, Texas.
November 21, 1935.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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May it please the Court:

Petitioners make the following reply to the brief of the Government in opposition to their petitions for writs of

certiorari and for motions for injunctions to preserve the *status quo*.

I.

Applicability of R. S. Sec. 3224.

Petitioners are well aware of the "system of corrective justice" for the collection of taxes. However, the whole basis of that system for summary collection and "litigation later" is the existence of the opportunity to litigate later. *Phillips* v. *Commissioner* (1931), 283 U. S. 589, 596. The cases cited by respondent have no application to the present situation where the opportunity to "litigate later" is taken away by an act of Congress.

II.

Petitioners' Remedy at Law is in No Sense Plain, Adequate or Complete.

Petitioners do not, as stated by the Government (Br. 10), contend that Sec. 21 (d) is unconstitutional. Indeed, they could make no such contention in this case since that statute is not before the Court except insofar as it bears upon the constitutionality of Sec. 21(a) of the Act and Secs. 115-131, U. S. C., as amended.

As has been pointed out in petitioners' briefs in support of their petitions for writs of certiorari the case of *U. S.* v. *Jefferson Electric Co.*, 291 U. S. 386, involved a wholly different situation and has no application here. Furthermore, the case of *Pacific States Box & Basket Co.* v. *White* (November 18, 1935) is entirely without application since petitioners have set out in great detail the method of conducting the rice milling business and have detailed the reasons why, in their particular business, it would be impossible to make the proof required by Sec. 21(d) (R. 16-21).

Nor is the case of *Burnet* v. *Houston*, 283 U. S. 223, at all in point for that case merely involved the inability of a particular taxpayer to make proof of the value of certain property in 1913, which property was then owned by

him and thereafter sold. There was no question there involved of injunctive relief or of the adequacy of a legal remedy afforded by statute. Furthermore, that case involved the mere inability of a single taxpayer to make proof of a particular fact necessary in order to establish his case for refund. In the cases now before the Court petitioners assert that on the face of the Act itself it is impossible for the burden of proof set up in Sec. 21 (d) to be met by *any* processor of *any* basic agricultural commodity. Petitioners further assert that, even if this were not true, the detailed facts alleged in their bill with regard to the peculiar conditions in the rice industry present a case of an entire class of taxpayers being deprived of a legal remedy as distinguished from a single individual being unable to make proof of a certain fact in a particular case.

On pages 12 and 13 Respondent refers to considerable extraneous matter which is to be found nowhere in the record and which, we submit, is not properly before the Court. Petitioners are not advised with respect to any of these alleged facts, but do affirmatively deny the apparent attempt to suggest the inference that some rice millers have made claims for refunds inconsistent with the position taken by petitioners here. According to respondent's brief so-called "conversion factors" (purely arbitrary, of course) for rice were not finally fixed by the Secretary of the Treasury until September 1935, the very month in which the taxes here involved became due. Since these taxes have not yet been paid, obviously there could have been filed no claims for refunds. In addition, the refunds there referred to are entirely different from the refunds which would be involved under Sec. 21(d) and are really no more than drawbacks. In any event, these petitioners are certainly not bound by what refund some other processor of a different commodity in a different business may have been willing to accept in a situation which assumed the validity of the tax. Petitioners can only reiterate what has been said in their original briefs, that on the face of

the Act itself an impossible burden of proof has ben set up. In this connection the Court is respectfully referred to the article "Taxation" in Vol. XIV of the *Encyclopedia of the Social Sciences*, p. 531. At page 535 there is found the most recent discussion of all the various *theories* with regard to the "passing on" of taxes and there it is stated that "* * * the amount of verified knowledge concerning the shifting and incidence of taxation is disappointingly slight * * *." (p. 537.)

In petitioners' original briefs the Government was invited to suggest just *how* the proof required by Sec. 21(d) could be made by these petitioners, or any other taxpayer similarly situated, but the invitation has not been accepted. Petitioners submit that, apart from any peculiar conditions existing in the rice industry, it is too much to ask them to make proof or disproof of an economic theory about which learned men have been differing for generations. If all the scholars who have been studying for these many years the question of "passing on" of taxes have been unable to devise any method of *factually* proving or disproving the theory, it is hardly to be expected that these petitioners will be able to devise a method overnight.

III.

The Alleged Prohibition of Sec. 21(a) of the Act.

As to this section of the brief of the Government it need only be said that the brief wholly fails to even discuss the cases and arguments presented in the original briefs of petitioners.

IV.

The Alleged Unjust Enrichment.

Here again the Government falls back upon the *Jefferson Electric Case, supra.* In that case, the Act permitted the recovery of the tax by whatever person actually paid it. If the taxpayer failed to prove that he had not collected the tax from the purchaser of the article involved he could

nevertheless get a refund of the tax by giving a bond conditioned that he would pay the money over to the purchaser who had actually paid. There is no such provision in the present Act and the Government makes the astounding proposition that the Government should take and keep *all of the tax* simply because of the possibility that someone else other than these petitioners might have, to some undisclosed extent, borne the ultimate economic burden of the tax. Petitioners are not here seeking to recover money in the hands of the Government as was the taxpayer in the *Jefferson Electric Case*, but they are seeking to prevent the Government from taking from them by forcible process monies which petitioners say the Government is not entitled to. In such a situation the doctrine of "unjust enrichment" would in any event have no application.

These matters aside, however, the complete answer to this contention of the Government is that it *assumes* that the taxes have been "passed on," a matter which petitioners confidently assert can neither be proved nor disproved.

V.

The Constitutionality of Secs. 115-131 U. S. C., as Amended.

Respondent's brief makes no answer to petitioners' contention that, even if Sec. 21(a) forbids the granting of an injunction in these cases, and so forbidding, is constitutional, then Secs. 115-131 U. S. C., as amended, as applied to these petitioners, are unconstitutional. We submit that even if the Government's position with reference to R. S. Sec. 3224 and Sec. 21(a) of the Act were correct the petitioners would be entitled to an injunction against the use of the *summary proceedings* provided in the sections of the Code refered to. Such an injunction would of course leave the Government free to institute suits against petitioners for collection of the taxes, in which suits they could raise the constitutionality of the Act.

VI.

Conclusion.

The District Court in this case has entered a final judgment; the Circuit Court of Appeals has entered an order which, in effect, finally disposes of the case on the merits since it has specifically held that it is *without jurisdiction to grant the sole relief sought* by petitioners. In this state of the record, the proposition of the Government that certiorari should be denied until after the Circuit Court of Appeals has reaffirmed its holding several months hence, is simply a suggestion that petitioners should never be allowed to present to any court the grave constitutional questions involved in these suits. The great importance of having the questions here involved determined by this Honorable Court has been pointed out in an editorial comment in the November 1935 issue of the Harvard Law Review at p. 109. This is not a case where petitioners are attempting to "skip" the Circuit Court of Appeals for the simple purpose of procuring an early decision of the questions involved. On the contrary, it is a case where petitioners seek only to protect their constitutional rights, and to do it in the only manner which is open to them.

If the position here taken by the Government be sustained it means that in the future the Government will have no difficulty in assessing, collecting and retaining unconstitutional taxes. All that would be necessary would be to withdraw the Government's consent to be sued, forbid injunctive relief in the courts, and proceed to the collection of the taxes by the summary procedure afforded under the Code.

These petitions present squarely to the Court the great public question of the taxpayer's right to injunctive relief in cases where that is the only method open to him to protect his constitutional rights. This question is not to be solved by merely citing R. S. Sec. 3224 or Sec. 21(a) of the Act. The rights, not merely of these petitioners are in-

volved, but the rights of citizens who are plaintiffs in similar suits pending in inferior Federal courts throughout the country. On the right of these citizens to injunctive relief depends not only whether these particular taxes shall be collected from them, but in many instances, their very right to continue in existence as going concerns. Denial of the relief sought by petitioners here can have no other result than the denial of the rights of any citizen to present and orally argue in any appellate court the great public question here involved. It is noteworthy that the Government has not denied, as it can not deny, that grave injury will result not only to these petitioners, but to all others similarly situated, if the relief prayed for here is denied. Likewise, the Government does not deny, as it can not deny, that no injury can result to the Government if the relief prayed for is granted.

It is respectfully submitted that the petitions for certiorari and the motions for injunctions to preserve the *status quo* should be in all respects granted.

Respectfully submitted,

HOMER L. BRUCE,
JOHN P. BULLINGTON,
Counsel for Petitioners.

BAKER, BOTTS, ANDREWS & WHARTON,
Of Counsel.

Houston, Texas.
November 21, 1935.

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MOTION FOR TIME TO FILE RESPONSE TO PETITIONS FOR CERTIORARI AND ANSWERS TO MOTIONS FOR TEMPORARY INJUNCTIONS

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 577

RICKERT RICE MILLS, INC., PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING United States Collector of Internal Revenue for the District of Louisiana, Respondent

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No. 578

A. B. DORE, PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING United States Collector of Internal Revenue for the District of Louisiana, Respondent

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No. 579

UNITED RICE MILLING PRODUCTS CO., INC., PETITIONER

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30471—35

No. 580

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RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING United States Collector of Internal Revenue for the District of Louisiana, Respondent

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No. 581

T. SIMON, PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING United States Collector of Internal Revenue for the District of Louisiana, Respondent

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No. 585

LEVY RICE MILLING CO., INC., PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING United States Collector of Internal Revenue for the District of Louisiana, Respondent

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No. 586

FARMERS RICE MILLING CO., INC., PETITIONER

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTing United States Collector of Internal Revenue for the District of Louisiana, respondent

No. 587

NOBLE-TROTTER RICE MILLING CO., INC., petitioner

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING United States Collector of Internal Revenue for the District of Louisiana, respondent

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND MOTION FOR INJUNCTION TO PRESERVE STATUS QUO

MOTION FOR TIME TO FILE RESPONSE TO PETITIONS FOR CERTIORARI AND ANSWERS TO MOTIONS FOR TEMPORARY INJUNCTIONS

The motions for temporary injunctions in five of these cases were delivered to the Solicitor General at 4:00 P. M. on Tuesday, November 12, 1935, and such motions in three of the cases were delivered on Wednesday, November 13, 1935. The petitions for certiorari in five of the cases were delivered on Wednesday, November 13, 1935, and three of the petitions were delivered on Thursday, November 14, 1935, to the Solicitor General. The records in five of the cases were received about 4:00 P. M. on Thursday, November 14, 1935, and the records in the remaining three cases had not been received at midnight last night.

The bills of complaint in all of these cases were filed in the United States District Court for the Eastern District of Louisiana on October 28, 1935. Motions

for preliminary injunctions and motions to dismiss the bills of complaint were heard by that Court on October 28, 1935. On the same day, such injunctions were denied and motions to dismiss the bills were granted by the District Court. On October 29, 1935, petitions for appeal were filed and allowed by the District Court and the appeals were docketed in the Circuit Court of Appeals for the Fifth Circuit on October 31, 1935. On November 5, 1935, the Circuit Court of Appeals heard and denied motions for injunctions pending the appeal.

On November 11, 1935, motions in five of these cases were presented to Mr. Justice Cardozo, which we understand have been referred by him to the full bench. Meanwhile, the eight petitions for certiorari were filed with the Court and notice of the filing has been received by the Solicitor General.

The question as to whether or not the motions should be granted depends upon whether or not they are ~~an~~ aid of the exercise of the court's jurisdiction as to the petitions for certiorari. The motions are based on Section 262 of the Judicial Code, which authorizes writs in aid of jurisdiction. *Ex parte United States*, 287 U. S. 241, at 245–246.

The petitions for certiorari involve the validity of Section 3224 of the Revised Statutes and Section 21 (a) of the Agricultural Adjustment Act, as amended August 24, 1935. These sections purport to bar relief by injunction against the collection of taxes, the latter section referring specifically to processing taxes. The provisions are attacked in the petition as unconstitu-

tional because arbitrary and unreasonable and thus violative of the Fifth Amendment to the Constitution and also violative of Section 2 of Article 3 of the Constitution.

It is the Government's position that Section 3224 of the Revised Statutes and Section 21 (a) of the Agricultural Adjustment Act, as amended, require the taxpayer to pay the tax and bring an action in the District Court to recover a refund of any tax erroneously or illegally assessed and collected; that the taxpayer has an adequate remedy at law under Section 21 (d) of the Agricultural Adjustment Act, as amended (*United States* v. *Jefferson Electric Co.*, 291 U. S. 386); and that the orders of the Circuit Court of Appeals, denying the temporary injunctions, and the final orders and decrees of the District Court, denying the injunctions and dismissing the bills, were proper.

The Government desires an opportunity to file answers to the motions for temporary injunctions and this can be done effectively only when accompanied by responses to the petitions for certiorari.

It appears that efforts to collect the tax will not be made during the period of time for which an extension is applied for by this motion, since petitioners in cases 577 to 581, inclusive, state in their supplemental brief in support of the motion for an injunction as follows (p. 3):

> Petitioners' taxes for the month of September are now past due and counsel for petitioners have been advised today that the

respondent proposes to give notice and demand for the payment of such taxes not later than November 20th and such notice and demand will within 10 days thereafter authorize respondent to use all of the summary methods of collection provided in Sections 115–131 of Title 26, U. S. C.

WHEREFORE, on behalf of the respondent, the Solicitor General moves for time until Friday, November 22, 1935, at 12:00 noon, to file answers to the motions for temporary injunctions and responses to the petitions for certiorari.

STANLEY REED,
Solicitor General.

NOVEMBER 15, 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935